IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

THE UNITED STATES, *Plaintiff in Error*,

vs.

C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL and THOMAS MOSGROVE, *Defendants in Error.*

No. 148.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR

A material allegation of the complaint put in issue by the general denial, is as follows: "On the 8th day of May, 1893, the said C. C. McCoy and the said sub-contractors did abandon the said contract and did fail and refuse to perform the same."

Before the Government could recover in this action, it must sustain this allegation by competent and sufficient proof.

We assert that the transcripts from the Department, unsupported by other evidence, do not constitute such proof.

For the convenience of the Department in the administration of public business, the following statutes have been enacted:

Section 889, R. S.:

> "Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor, and transcripts from money-order account books of the Post-office Department, when certified by the Sixth Auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, *in case of delinquency* of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence and the court shall be authorized thereupon to give judgment and award execution subject to the provisions of law as to proceedings in such civil suits"; and
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> Section 882, R. S.: "Copies of any books, records, papers or documents in any of the Executive Departments, respectively, shall be admitted in evidence equally with the originals thereof."

It is contended on behalf of the Government that under the foregoing statutes the statements of the officers of the Department are sufficient, not only to indicate the amount of indebtedness, but to establish the delinquency itself.

Drastic as these statutes are, and contrary to the ordinary rules of evidence, they have nevertheless been recognized as valid by decisions of this Court. It has, however, never been held that a statement of the Department issued and certified under these statutes is sufficient to establish in any court a fact which in the ordinary course of business does not come within the knowledge of the officers who makes the statement.

Before there can be any recovery by the Government,

there is a naked substantive fact to be established, to-wit, that C. C. McCoy did abandon his contract.

Because the Government has, during all the years this case has dragged, insisted with apparent earnestness that this ultimate disputed fact is established *prima facie* by the transcripts, we will discuss the authorities which have construed the statutes in question. Though we are clear in our belief that a mere reading of the statutes will convince the Court that our position is correct, we shall nevertheless discuss authority, and in the event it shall please the Court to turn to the various Federal decisions construing and interpreting these statutes, we undertake to note them all.

We shall first take up the cases upon which we apprehend plaintiff in error will rely, and endeavor to ascertain if these cases furnish any warrant for the contention of Government.

Soule v. United States, 100 U. S. 8.

This was an action upon the bond of a revenue collector. The statute made it the duty of the fifth auditor to audit the accounts of the collector, and the collector was chargeable upon the debit side of his account with moneys collected by him. The auditor struck a balance showing the excess of moneys actually received over what was accounted for by the collector, and a transcript of this account was held to be *prima facie* evidence of the correctness of the balance certified. The Court in its opinion uses this language:

> "By the terms of the bond in suit the sureties are to become responsible if their principal does not justify and faithfully account for and pay over to the United States all public moneys which may come into his hands or possession. *Beyond doubt*

the amount went into his hands and possession as public money. * * *."*

It is evident, therefore, that the auditor in certifying these particular transcripts was certifying *to something* of which, from the records of his office, he had knowledge. Having from accounts rendered him by the collector, a record of amounts actually received by that officer, it was competent for him to state a balance. To ascertain the fact of the shortage he was not dependent upon hearsay or uncertain evidence.

United States v. Stone, 106 U. S., 525.

This was a suit upon the bond of a collector. Referring to an instruction asked by the Government, the Court uses the following language:

> "It is next assigned for error, that the court omitted to charge the jury, 'that facts not properly appearing on the books of the Treasury Department could not be embraced in the transcript, facts of which the department had no knowledge, and if so embraced they did not constitute proof in this case.' This alleged omission on the part of the court is stated in the bill of exceptions to have occurred in connection with the following instruction, which was given: 'That while it was true that the plaintiff could only recover in this case for money actually collected by Emory, and not accounted for to the government, yet, if they believe from the evidence that Emory had received the assessment rolls of the taxes imposed, that was *prima facie* evidence that he had received the money on them in the absence of any other or further proof on that subject.'
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> Although the giving of this charge was excepted to, the error assigned upon it was not pressed in argument; nor could it be maintained, as the instruction was undoubtedly correct. Nor does it appear from the bill of exceptions that the court was asked

to give the instruction, the omission of which is not complained of; although it states that for that cause the defendants then and there excepted. But, waiving the form of the exception, it must be overruled, because, however correct the rule may be, which it states the court omitted to give to the jury, it is not shown, by anything in the present record, how it could apply to the case.

It was not shown that there were any facts embraced in the transcripts which could not properly appear on the books of the Treasury Department, *nor any of which the department had not knowledge;* and no attempt has been made to point them out in argument."

It can be easily seen how this case differs from the case at bar, when we note the last paragraph of what is quoted, a partion of which we have italicized.

United States v. Dumas, 149 U. S., 278.

In this case it was contended by the Government that the transcript from the department showing the order of the Postmaster General actually and finally established the falsity of the postmaster's account. This contention was not sustained. The Court, quoting from the decision of United States v. Barlow, 132 U. S., 271, approves the following language, which it will be apparent applies with force to our case:

"But the very rule supposes that information upon the matters upon which the judgment and discretion are invoked is presented to the officer for consideration, or knowledge respecting them is possessed by him. He is not at liberty any more than a private agent to act upon mere guesses and surmises without information or knowledge upon the subject."

If this language was advisedly used and the Court meant thereby to lay down a rule of decision to be followed in

subsequent cases, there is an end to the controversy presented by the present case; for certainly it cannot be contended that the officer from whose office the transcript in this case purports to come had any knowledge as to whether or not C. C. McCoy had failed to carry the mails in San Francisco.

At the risk of being tedious, let us state again that we are willing to accord to the Department's statement all the force and effect to which it is entitled. We are willing to admit that it is proper and competent evidence, and sufficient to establish *prima facie* the indebtedness of C. C. McCoy to the Government, after it is established that he is indebted at all. We are not, however, willing to concede that the Postmaster General can by his own *"ipse dixit"* establish a fact concerning which he has no knowledge. *"He is not at liberty any more than a private agent to act upon mere guesses and surmises without information or knowledge on the subject."*

Let us examine the cases where this Court and other Federal Courts have held the facts necessary to be proved were not established by the transcripts from the Treasury Department.

One of the earliest cases is *United States v. Buford*, 3 *Peters*, 12, decided in 1830. In this case it was claimed that the sum of $10,000 had been advanced to Buford by one Morrison, and it was claimed this advance was made for the use of the United States. The Treasury Department made up a statement charging Buford with this amount, and upon such statement sought judgment. Had this money gone to Buford through the regular channels of the Department, so that its advance to him were a matter of which the Department would in the ordinary course of business have had knowledge, no doubt the transcript

would have been held sufficient. Such, however, was not the case, and the Court uses the following language:

> "An account stated at the Treasury Department, which does not arise in the ordinary mode of doing business in that Department, can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the Department where the transactions are shown by its books. In these cases the officers may certify, for they must have official knowledge of the facts stated.
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> But where moneys come into the hands of an individual as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the Department. In this case, therefore, the claim must be established not by the treasury statement, but by the evidence on which that statement was made."

Applying then to the case at bar the language quoted, we can make our position clear. The books of the Treasury Department do not exhibit the fact that C. C. McCoy had abandoned his contract, for that is a fact not officially known to the officers of that department. Therefore, the fact of abondonment must be established not by the treasury statement, but by the evidence on which that statement was made. That evidence is a copy of a copy of a telegram purporting to have been sent by one Backus, Postmaster at San Francisco. The copy of this message from which the copy included in the transcripts was made, would not have been competent evidence, and certainly the certificate cannot make it any the less incompetent. We shall take occasion to refer to this telegram later.

United States v. Jones, 8 Peters, 375.

In this case it was held that a treasury transcript was not sufficient to establish the propriety of a charge on

account of certain bills of exchange which had not been drawn to the order of the person sought to be charged. In other words, that the money had been received by the intestate of Jones was not established by the fact that he had been charged with the amounts upon the books of the Department.

Hoyt v. United States, 10 Howard, 109.

This case presents a fair example of items properly charged and properly certified against a public officer. It appears the account was founded upon quarterly accounts rendered to the Department by the collector himself in pursuance of law. They were, therefore, matters properly within the knowledge of the officers of the Department.

United States v. Forsythe, 6 McLean, 584.

It will be seen by the following language that this case supports our contention:

> "The transcript offered in evidence was objected to on the ground that the items were not set down from the returns of the defendant, but were returned by his successor, from talking with persons who had paid duties in the office.
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> The Treasury transcript is made evidence when duly certified. There is no objection to the authentication of this document, but the items of which a considerable part of it is composed, though put into the transcript, are not evidence. They were not ascertained and established by the ordinary official action of the Department, and consequently they are not evidence. Many of the items were put down by an estimate, and others had *no better proof of their verity than hearsay, which is not admissible.*"

The application of the concluding sentence to the case at bar is readily apparent.

United States v. Case, 49 Fed., 270.

During the preparation of this brief we have been favored with a copy of the brief on behalf of the United States, and we find the Attorney General has anticipated our comment on the above case. Notwithstanding what he says, we are still clear that the two cases cannot be distinguished. The following language is used in the case last cited:

> "The accounts offered in evidence by the plaintiff bring the defendants into debt because the officials of the postoffice department have charged the defendants in gross with commissions illegally retained without a word of proof so far a sthe accounts show, to sustain the charges. These officials have tried the question at issue between the Department and the Postmaster, found him guilty of malfeasance, assessed the damages against him and certified their findings.
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> The evidence, if there was any, on which these findings are based, has not been returned."

The Attorney General professes to detect a difference between this case and the one at bar, because in our case the evidence upon which the finding of McCoy's abandonment was based is returned, that is, it is furnished by the copy of the purported telegram from the Postmaster at San Francisco. Now, we submit the position of the Government is as weak, or even weaker, when it relies upon a finding which does not expose the evidence upon which that finding is based, than when the fact appears that its sole reliance is on a finding based entirely upon such incompetent and improper evidence as the copy of the purported *telegram of the Postmaster.*

Further as to the contention that the abandonment is shown by the copy of Postmaster's telegram.

We respectfully ask the Court to note the bland admission contained on page 40 of the Government's brief, that

the transcript of account is insufficient *unaided* to make out a *prima facie* case, and the further contention that the copy of the purported telegram supplies the deficiency.

Have we not a right to assert that this admission should end the case? It is very evident that the Attorney General has fallen into error as to the effect he would have accorded to the copy of the telegram certified under Sec. 882, R. S. It is by a careless analysis of Sections 882 and 889, R. S. A brief consideration of these sections will demonstrate the error. These two sections provide for two different kinds of certificates, and for the giving of a different effect to matters certified under them respectively. Under Sec. 889, it is provided that a statement of account certified as therein prescribed shall be admitted in evidence and upon it judgment may be given. Under this provision of the statute an account was made up and certified by the Auditor for the Postoffice Department in these words:

> "* * * do hereby certify the annexed to be a true and correct statement from the records of this office of the account, etc."

The copies of the bond, proposals, bids, and the telegram were certified under Sec. 882 by the Postmaster General, in the following words:

> "I certify that the annexed are true copies taken from the files and records of this Department."

An entirely different effect is given to these papers so certified, from that given to the copy of the account from the books certified under Sec. 889. By Sec. 882, it is merely provided that such copies shall be admitted in evidence as if they were originals. It is not provided by this section, or any other law, that the Court may give judgment upon them.

This distinction is made to appear in the case of *United States v. Pinson*, 102 *U. S.*, 548, to which we ask the Court's attention.

The purpose of Section 882 is clearly to permit the Department, while retaining original documents and papers in its office, to send out properly certified copies which will have the same effect as evidence as the originals from which the copies are made, but it is not intended to permit the Department by its mere certificate to give to a copy of a paper a character as evidence which the original in its possession did not possess. Suppose we should admit that the fact of McCoy's abandonment, of which Mr. Backus, Postmaster at San Francisco, seems to have had knowledge, could be proved by an *ex parte* statement of Mr. Backus in the form of a telegram. Where is that statement in its original? In the office of the Telegraph Company at San Francisco, no doubt. A copy of such statement received at Washington is not such original, but is only secondary evidence, admissible nowhere until the absence of the original be accounted for; and the most solemn certificate which the Postmaster General can make cannot convert it into an original or give it competency.

The Honorable Attorney General so strenuously contends that the statements made by the Postmaster at San Francisco to the Postmaster General, in the form of telegrams, being official reports of a public officer, are admissible to prove the facts they contain that we are giving the point more attention than we should were it less earnestly asserted. We have always thought a sufficient answer lay in our demonstration that the Government did not establish by any competent proof that the Postmaster at San Francisco ever made such a statement, and this we still maintain. We will, however, go farther and invoke the Court's attention to the case of *United States v. Corwin*,

129 *U. S.*, 381. In this case one Phillips had contracted with the Government to deliver a certain quantity of hay to the military station at San Antoino, Texas. It was claimed that he had defaulted in his contract. This Court held that the written statements of the officers of the Quartermaster's Department, who were upon the ground and must have had knowledge of the facts, were insufficient to prove the failure of the contractor and the demand for performance.

In the case of *United States v. Carr*, 132 *U. S.*, 644, the same Section 3849 of the Revised Statutes which is referred to by the Attorney General was under consideration. The Court uses the following language, quoting in part from an earlier case:

> "The presumption that public officers have done their duty, like the presumtion of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his Treatise on Evid., Sec. 300, says: 'The true principle intended to be asserted by the rule seems to be that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of these acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' *Nowhere is the presumption held to be a substitute for proof of an independent and material fact.*"

In conclusion we desire to say that it has always seemed clear to us that the contention of the Government must fail for two main reasons. The first is that the transcript of account certified under Sec. 889, R. S., is not sufficient to authorize entry of judgment, because that section only

authorizes the transcript to be used in evidence *"in case of delinquency* of any postmaster or contractor." Manifestly, it would be begging the question to assert that the transcript is sufficient to establish the fact of delinquency, which is the very condition upon which the right to use it in evidence at all is predicated.

In the second place, whatever presumptions may be indulged in favor of the acts of a public officer, this presumption does not supply proof of a substantive fact, and furthermore, even if it were the law that it did, there is no competent evidence of any statement of the Postmaster at San Francisco (who is the only individual who seems to have possessed knowledge) made in the line of his official duty or otherwise.

It has always seemed more than strange to us that if McCoy had been guilty of the flagrant violation of contract which is charged against him, the Government could not have found some way to prove such fact without attempting to violate the fundamental rules of evidence.

We are freely admitting the validity of the statutes upon which the United States relies. We think we can detect in their enactment the design of Congress to relieve the Government of unnecessary embarrassment and hardship in the production of original documents, and the proving of accounts stated upon its books, when contractors and others are proceeded against in the Courts. This purpose is entirely legitimate. But it is not the intention, and if it were, would not be a fair purpose, to permit the Government to proceed to judgment in a Court in the entire absence of any proof as to material and substantive facts necessary to be proved as a part of its case.

Respectfully submitted,

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